

EXHIBIT D

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1 absence of such a provision when federal statutes routinely
2 provide for rights to federal -- to judicial review when that
3 is the congressional intent. If I were to imply such a
4 provision here that would be a species of judicial legislation.
5 Second, assuming without deciding that I could appropriately
6 look at legislative history on a matter where the statute is
7 not in any way ambiguous, judicially in grafting rights under
8 that statute would be particularly inappropriate when they'd be
9 inconsistent with the congressional desire to establish this
10 mechanism to avoid the excessive costs and delays of litigation
11 and to impose tight deadlines to get the arbitration process
12 completed.

13 Nor can I accept Rally's argument that New GM
14 conceded a right to judicial review by reason of its
15 willingness to proceed under the AAA's commercial arbitration
16 rules. In responding to Rally's arbitration demand, New GM
17 expressly stated that it did not waive any objections it might
18 have to the arbitration or to any of the AAA's commercial
19 arbitration rules including, in particular, where such rules
20 would be inconsistent with the provisions or purposes of the
21 Dealer Arbitration Act. For that same reason, I can't find a
22 waiver on the part of New GM of its rights based on a failure
23 to protest again after its initial reservation of rights was
24 put on the record.

25 Then even if New GM had agreed to AAA arbitration

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1 rules, the arbitration rules called for a mechanism to enforce
2 an award not to attack it. Those rules provided that parties
3 to an arbitration under these rules shall be deemed to have
4 consented the judgment upon the arbitration award may be
5 entered in any federal or state court having jurisdiction
6 thereof. See Rule 48(c) of the AAA Commercial Rules quoted at
7 paragraph 29 of the Rally brief.

8 But that language conveys a right to enforce the
9 arbitration award not to attack it. For example, if New GM had
10 failed notwithstanding the arbitration award that Rally doesn't
11 complain about to let Rally keep the three franchises the
12 arbitrator said Rally could keep, Rally could have, at least
13 arguably if not plainly in my view, come back to me and say
14 make New GM do what the arbitrator said it should do. But this
15 is the exact opposite of what we have here and one that's not
16 authorized by the federal statute.

17 As I indicated in oral argument, and I think both
18 sides agreed, the reasonable course for a judge in my position
19 would be to construe the Court's earlier order and the
20 subsequently enacted federal legislation to achieve as much
21 harmony as possible and to honor the congressional intent to
22 the extent that the federal legislation trumped my earlier
23 order. But it would also be appropriate in my view to honor
24 the congressional intent only to the extent that the federal
25 legislation trumped my earlier order. Congress did say, of

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1 course, with respect to providing for a defense to enforcement
2 of the wind-down agreements with respect to any areas where the
3 arbitrator ruled in the dealer's favor. And I think that if
4 New GM had failed to honor the arbitrator's award, as I
5 indicated a moment ago, I'd almost certainly enforce it. But
6 that is the way by which we'd maintain harmony between my
7 earlier order and the new Dealer Arbitration Act providing for
8 the rights of dealers to invoke the arbitration mechanism in
9 the fashion for which Congress provided. It doesn't provide
10 for a blank check from me to rewrite the Dealer Arbitration
11 Act.

12 Nor do I think that Rally can get around what is, in
13 essence, an effort to achieve a quasi-appellate review of the
14 arbitration award by saying that it's asking the California
15 district court to make a federal question type determination
16 under the Dealer Arbitration Act. That might be the case if
17 Congress hadn't established the arbitration mechanism and if it
18 had conferred on the district court's jurisdiction to decide
19 issues as to what is or is not a dealership franchise. But the
20 whole point of the statutory scheme was that New GM and dealers
21 would proceed by arbitration. And while, if New GM had refused
22 to arbitrate in the first place, I think that at least I would
23 have had jurisdiction to order New GM to do so. But now that
24 each of New GM and Rally have engaged in the arbitration
25 process, presumably without any Court forcing either to do so,

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1 we can't make the underlying arbitration award evaporate. We
2 can only consider the circumstances, if any, under which the
3 arbitration award is subject to judicial review. And I've
4 already noted, of course, that the statute doesn't provide for
5 such review.

6 Now, in that connection, I do not believe that under
7 the allegations we have here, this construction raises
8 constitutional issues. I assume without deciding that
9 procedural due process requires a quasi-judicial determination,
10 like an arbitration, to be conducted by a decider who isn't
11 taking bribes or conspiring with one or another of the parties
12 or, though it's more debatable, who ignored facts or binding
13 authority on point. If there were such a contention, I'd at
14 least have to consider whether I'd address it. And I think
15 it's better to construe the Dealer Arbitration Act in such a
16 fashion as to avoid any constitutional issues that would
17 otherwise be relevant.

18 But I have no allegations of bribes, conspiracy,
19 fraud or even manifest disregard of existing law in the matter
20 before me. Though, if there were such allegations, I think I'd
21 have to seriously consider whether there might be some implied
22 right to remedy such a wrong or that in exercising my exclusive
23 to jurisdiction to enforce or, impliedly, deny enforcement of
24 the deferred termination agreements, I should take such facts
25 into account. But once more, I emphasize that I have no such

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1 allegations here.

2 In the absence of issues of that character, I think
3 that Thomas and, particularly, Switchmen, the two decisions by
4 the Supreme Court, apply to establish a rule that where an
5 arbitrator was given the power to resolve controversies under a
6 statute, that is, the Dealer Arbitration Act, where dealers and
7 New GM were given rights under that statute, reviewed by the
8 federal district courts or, of course, bankruptcy courts that
9 are arms of the district court and have the power to issue
10 final orders on core matters, of the arbitrator's determination
11 is not necessary to protect those rights. I think I should
12 restate it because I put too many parentheticals in there.
13 Where dealers and New GM were given rights under the statute
14 reviewed by the federal district courts of the arbitrator's
15 determination is not necessary to protect those rights. And,
16 of course, that's a paraphrase of Thomas, 473 U.S. at 588
17 quoting Switchmen where I'm analytically substituting the
18 Dealer Arbitration Act for the Railroad Labor Act and where I'm
19 substituting arbitrator's determination for board's
20 determination.

21 So I don't believe that judicial review is necessary
22 except in those cases not presented here, and here only
23 arguably, where there are allegations of fraud, corruption or
24 manifest disregard of an existing decision. And for reasons I
25 described above, I think the exclusive jurisdiction provisions

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1 of the sale order must stick.

2 First, of course, they're res judicata so they remain
3 binding in the absence of an appellate ruling changing them for
4 a legislative pronouncement that does so. Second, I assume
5 without deciding that Congress could, if it wished, to have
6 taken my exclusive jurisdiction away just as Congress can take
7 away jurisdiction from the lower federal courts on other
8 matters. But Congress didn't do that. If we temporarily put
9 aside issues as to the right to judicial review and decisions
10 as to the merits, I assume, without deciding, that a California
11 district court could under its diversity jurisdiction have
12 subject matter jurisdiction over a controversy like this one.
13 But if it did, it would be foreclosed from exercising its
14 subject matter jurisdiction by reason of the final exclusive
15 jurisdiction order that I entered back in July of 2009. This
16 is no different analytically than the effect that an exclusive
17 jurisdiction order would have over a state court proceeding.
18 Most state courts don't need an expressed grant of subject
19 matter jurisdiction to hear controversies before them. They
20 normally have subject matter jurisdiction over whatever comes
21 through their doors. But that doesn't mean that they can hear
22 controversies when a court order or other federal law, like
23 some federal antitrust laws or securities laws, give a federal
24 court exclusive jurisdiction. Some federal statutes and the
25 order that I entered into are limits on jurisdiction that might

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1 otherwise exist.

2 Then Rally makes a judicial estoppel argument noting
3 that in a proceeding against another dealer, New GM brought an
4 action in federal court in California invoking diversity and
5 federal question jurisdiction, the latter under the Dealer
6 Arbitration Act, seeking to require that dealer to comply with
7 a settlement agreement and to drop its efforts to proceed under
8 the Dealer Arbitration Act. Frankly, I'm not impressed with
9 the wisdom of that approach and, for the life of me, can't
10 understand why New GM sought relief that way instead of coming
11 to me. But I don't think its effort in that regard rises to a
12 level of a judicial estoppel.

13 Rally depends on three statements to establish its
14 claim of judicial estoppel. They are that the district court
15 would have jurisdiction under 28 U.S.C. 1332; that the district
16 court would have federal question jurisdiction under 28 U.S.C.
17 1331 because the controversy there allegedly arose under the
18 Dealer Arbitration Act; and that arbitrators would only be
19 empowered to decide whether or not the specific dealership
20 should be added back to the GM dealer network and that "all
21 other issues that arise under the Act must be addressed by a
22 Court of competent jurisdiction".

23 I don't think that any of these are particularly to
24 the point. I've noted before that I assume that diversity
25 jurisdiction provides subject matter jurisdiction to the

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1 California court here. But I've also ruled that that can't
2 trump the bankruptcy court's exclusive jurisdiction provision.
3 And while I disagree that there and here would be federal
4 question jurisdiction under the Dealer Arbitration Act for the
5 particular claim there and here asserted, even if there were
6 such federal question jurisdiction, once more, it wouldn't
7 trump the bankruptcy court's exclusive jurisdiction provision.
8 And I don't think there's anything particularly inconsistent
9 between New GM's third point in that Santa Monica action and
10 the points it's making here given the difference between the
11 facts in each of those cases and the context in which New GM
12 made its observations. There, an attempt to enforce a
13 settlement agreement under which the namees (ph.) agreed to
14 dismiss their arbitration and New GM was saying that
15 arbitration wasn't appropriate at all rather than dealing with
16 the consequences of a completed arbitration in which there was
17 an arbitration award.

18 But even if there were, I'd see other problems in
19 invoking judicial estoppel as well. As Rally notes, at page 23
20 in its brief, citing the Second Circuit's decision in Uneeda
21 Doll Company, "judicial estoppel prevents a party from
22 asserting a factual position in one legal proceeding that's
23 contrary to a position that it successfully advanced in another
24 proceeding". Here, aside from the lack of inconsistencies, the
25 positions that have been taken are legal not factual. And

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1 there, New GM didn't ask the Santa Monica Motors court to
2 interpret or enforce the wind-down agreement or, indeed, to
3 interpret or enforce the Dealer Arbitration Act at all. The
4 latter point is why I think that New GM was just wrong when it
5 then tried to invoke the latter as a basis for 1331
6 jurisdiction. I'm not sure what it was thinking. But under
7 the standards of New Hampshire v. Maine, I find that the
8 positions are not clearly inconsistent and I cannot find any
9 perception that either the first or the second Court was misled
10 or that New GM would derive an unfair advantage here if not
11 estopped.

12 Finally, I think that even if judicial review were
13 available of the arbitrator's award, I couldn't vacate the
14 arbitrator's award here. First, even if the arbitrator was
15 wrong, I don't see the arbitrator having been so wrong that the
16 error would warrant bucking fundamental principles limiting the
17 scope of review of arbitration awards. There was no case
18 supporting Rally on this issue. Rally is, in substance, asking
19 the Court or the Courts to, in essence, make new law on this
20 point.

21 And assuming, though for reasons I just noted, I
22 think this assumption is unwarranted, that I could provide ab
23 initio review of the arbitrator's decision, I think the
24 arbitrator got it right at least on the arbitrator's assumption
25 that he could rule one way with respect to the Buick, GMC and

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1 Cadillac franchises and differently with respect to the Chevy
2 franchise. I think the dealer's sales and service agreements
3 have to be read separately. Each stated that it was executed
4 by GM "separately" on behalf of its division identified in the
5 specific addendum. And each dealer agreement provided that the
6 agreement for each line make is independent and separately
7 enforceable by each party and the use of the common form is
8 intended solely to simplify execution of the agreements. So I
9 think that in light of that, Rally had five franchise
10 agreements under which the arbitrator's ruling focusing on each
11 brand separately would be more than merely reasonable. If
12 otherwise warranted by the underlying facts, it would be right.

13 For the foregoing reasons, New GM is to settle an
14 order in accordance with the foregoing as quickly as reasonably
15 possible, that order to be settled on no less than two business
16 days' notice by hand, fax or e-mail. I assume that New GM will
17 use one of those methods so I don't have to provide for an
18 alternative mechanism if it were to use snail mail. The time
19 to appeal from this determination will run from the time of
20 that order's entry and not from the time of this dictated
21 decision.

22 All right. Not by way of reargument, are there any
23 matters that I failed to address or any questions?

24 MR. SNYDER: No, Your Honor.

25 THE COURT: Hearing none, we're adjourned. Good

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1 evening, folks.

2 MR. SNYDER: Your Honor, if I may just quickly?

3 THE COURT: Yes, Mr. Snyder?

4 MR. SNYDER: Your Honor, under Bankruptcy Rule 8005,
5 to the extent we seek a stay pending appeal and that would be a
6 necessary predicate for an award, for the reasons set forth in
7 our papers and in the oral argument, I request -- am making
8 this oral application for a stay of Your Honor's order pending
9 appeal.

10 THE COURT: I'll accept the oral application for a
11 stay but we'll do it after a ten minute recess. And each of
12 you can make your points at that point in time.

13 MR. SNYDER: Thank you, Your Honor.

14 (Recess from 6:19 p.m. until 6:37 p.m.)

15 THE COURT: Have seats, please. Okay. Mr. Snyder,
16 your application for a stay.

17 MR. SNYDER: Thank you, Your Honor. Your Honor, in
18 your decision, I believe the Court stated -- and I apologize if
19 I'm putting words in the Court's mouth -- that areas such as
20 manifest disregard for the law and fraud were not areas that
21 were alleged here. And that might be properly the province if
22 not exclusively the province of the district court in
23 California. And I would ask the Court to turn to, Your Honor,
24 Exhibit I which is Rally's petition to modify. And in Exhibit
25 I, Your Honor, starting on page 10, whether appropriately or

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1 not, Rally uses the Federal Arbitration Act as a guide as to
2 what the district court can look to when determining whether it
3 has jurisdiction. And it starts at the bottom of page 10, and
4 I'm quoting, "that the arbitrator in this matter was guilty of
5 misconduct, misbehavior and exceeded his power, i.e., manifest
6 disregard by ruling on a matter not submitted for determination
7 and, (2) attempting to fashion a remedy not authorized by
8 Section 747 of the Act." And the argument goes on and a little
9 farther down, it addresses corruption, fraud and undue means by
10 GM which, again, although it mirrors a section of the FAA, is
11 also grounds that Rally sought in the California district court
12 in order to vacate and modify the arbitration. So I wanted the
13 record clear that the manifest disregard of the law, fraud and
14 the usual grounds that a party would seek whether under a state
15 statute or the federal arbitration statute to undo the
16 arbitration were pled by Rally in the California action. And
17 so, I believe that those types of matters, and I believe Your
18 Honor pointed this out, matters of manifest disregard, fact and
19 law as well as fraud, corruption, mistake and exceeding powers
20 are matters that the California district court should hear --
21 can hear, excuse me, and should hear.

22 Your Honor, has basically said that you have sole and
23 exclusive jurisdiction even though the district court may have
24 jurisdiction over these matters. And as respectfully submitted
25 that the Court may have concurrent jurisdiction but over

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1 matters such as manifest disregard of the law that the federal
2 district court in California also has jurisdiction over this
3 matter. And it's properly before it now.

4 With respect to the federal question, again, Your
5 Honor seemed to indicate in his decision that the sole and
6 exclusive jurisdiction was given to the bankruptcy court as a
7 result of the wind-down orders. The Court did not address as
8 we go through in detail, starting at page 28 of our objection,
9 the decision of the Supreme Court in Vaden v. Discover Bank.
10 And I alluded to it, Your Honor, in the original argument. But
11 the Supreme Court, overturning, I believe, four circuit courts
12 in Vaden, specifically held that they can look through the
13 petition to look at the parties' underlying substantive
14 controversy. And, Your Honor -- and this is where the Court
15 and Rally might differ. The substantive controversy, the
16 predicate of the petition arises under the Dealer Arbitration
17 Act. It does not arise under the wind-down agreement because
18 it was created not from the wind-down agreement but the Dealer
19 Arbitration Act. So I think there's compelling reasons as a
20 result of the recent Supreme Court case in Vaden to allow the
21 federal district court to hear a federal controversy arising
22 out of a federal statute. And I've been practicing here for a
23 long time, Your Honor. To the extent that it's an issue
24 involving a purchaser wanting to get its -- the value of what
25 it bargained for, we are not saying this Court does not have

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1 jurisdiction. The Court has already held that it has arising-
2 to jurisdiction and it may well have that jurisdiction.

3 But I think I've pointed to at least two, the federal
4 question issue as well as the due process constitutionality
5 issue as to why the California district court has strong --
6 strong subject matter -- rights to exercise its subject matter
7 jurisdiction. This is not a cursory -- a statute that only
8 cursorily affects the federal court, but it directly affects
9 the federal court. And I believe, Your Honor, for those
10 reasons, the Court not entertaining or analyzing that and then
11 not seeing that the petition itself does seek -- does allege
12 manifest errors of law as well as fraud and improper powers by
13 the arbitrator that we would be successful on the merits. And
14 we would be able to, Your Honor, obtain a stay of Your Honor's
15 order to the extent it would give us additional time to seek a
16 stay or to seek a determination in either the district court
17 here or in California.

18 THE COURT: Well, I understand your desire to go to
19 the district court here. I have more trouble trying to go to
20 the district court in California. In fact, that walks, talks
21 and quacks a lot about the actions that Judge Weinfeld found so
22 objectionable in Teachers Insurance v. Butler before the Second
23 Circuit said what it said in Teachers Insurance v. Butler where
24 there was never to collaterally attack his judgment by going to
25 another court. I mean, I don't claim to be infallible, Mr.

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1 Snyder, but it seems to me that if somebody's going to say that
2 I'm wrong, it's got to be either the district court or the
3 Second Circuit.

4 MR. SNYDER: Your Honor, we were in front of the
5 California district court before GM was here. We can always go
6 back to the filing of the bankruptcy case. But this is clearly
7 different than Teachers. Here, we have already commenced an
8 action in the California district court. We're not forum
9 shopping and running to California because we don't like what
10 the Court is saying. We deferred in this case because they
11 made the motion that we were going to defer to the bankruptcy
12 court before we took any action in California. But we're not
13 looking around for a second bite of the apple. We're already
14 in California. Issues already been joined. They've already
15 answered. So we're at summary judgment stage anyway in
16 California and we have a ticking clock of October 31st. That's
17 very different than going to another Court when you don't like
18 what this Court has to say, Your Honor. I mean, I don't know
19 if we need to address that here. But that's not what we're
20 looking to do. It's for powers other than I to decide whether
21 we seek a stay here or we go back to the Court where there's
22 been a complaint and answer filed and seek a stay there. I'm
23 being straightforward with the Court. It's not our intent and
24 I know the Court might have discomfort with that, but the
25 action was already commenced there. And that's what led to GM

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1 coming here.

2 THE COURT: Well, forgive me, Mr. Snyder. The reason
3 that you can truthfully say it's discomfort is because I try
4 very hard to consume my anger and to maintain my demeanor. I
5 fully understand the rights of any litigant before me to take
6 me up the street. But going to another Court right after
7 you've litigated before me for the last three hours and I've
8 given you a ruling which may or may not be right but which was
9 after a lot of thought and effort is one that is more than a
10 source of discomfort.

11 Why don't you continue with the remainder of the
12 three bullets on the applicable case law on an entitlement to a
13 stay and address, if you will, what you're prepared to offer in
14 the way of a bond if I grant a stay?

15 MR. SNYDER: Your Honor, the argument with respect to
16 the constitutionality -- I had made the argument with respect
17 to whether a federal question exists vis-à-vis the
18 interpretation of the federal statute and going behind the
19 arbitration. I made as well -- I would point out, Your Honor,
20 actually there are four grounds. The third one is diversity.
21 And I think although GM was silent on it, the Court, I believe,
22 in its decision, admitted that diversity exists but, again,
23 stated that the sale order would trump the district court even
24 though diversity might existed there. And the fourth argument,
25 Your Honor, is 48(c) and Your Honor is correct. It does just

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1 refer to judgment. It does not refer to the right to vacate or
2 amend or to modify. It's respectfully submitted, though, Your
3 Honor, that the district court can make that decision as well.
4 Your Honor may be right in all they can do is say thumbs up or
5 thumbs down with respect to a judgment. But at least with
6 respect, I believe, to the fifty state laws, with respect to
7 arbitration and the FAA, it's not so limited, that applicants
8 are usually allowed by statute, certainly under the FAA, to not
9 only seek a judgment but to modify or vacate. But that's
10 something the California district court may hold as well, Your
11 Honor.

12 And because there are five sep -- four separate
13 grounds, the constitutionality, the federal question, the
14 diversity and Rule 48(c), in Rally's mind, is more than a
15 compelling reason to hold that concurrent jurisdiction exists
16 and not simply exclusive jurisdiction exists. That Your
17 Honor's sale order says what it says but that the Arbitration
18 Act raises issues that need to be addressed. And it's
19 submitted by saying diversity exists but the sale order trumps
20 it, Your Honor, I would suggest that the district court in
21 California does have jurisdiction and does also have the
22 authority to hear these issues. And for those reasons, I think
23 the Court or Rally would be successful in arguing that it would
24 be successful on the merits on those four particular grounds.

25 I would state also, Your Honor, that the judicial

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1 estoppel argument is just fascinating to me. I -- you asked a
2 question of GM and it was your last question, I believe, which
3 was are you saying you could have gone to New York or
4 California but you decided to go to California. And they said
5 yes. And so, what they're basically saying is we can go to
6 California or New York but you can't. And that argument is, in
7 essence, saying we've waived subject matter jurisdiction by
8 entering into the wind-down agreements. And I don't believe
9 that's correct. And I believe if GM can go into New York and
10 California then Rally can go into New York and California. And
11 to simply say that we're -- our fortunes rise and fall here,
12 well, neither -- GM's fortunes didn't rise and fall here
13 either. They chose not to come here. And so I think we should
14 have that same right.

15 And for those reasons, Your Honor, we'd like a stay
16 of Your Honor's order until there is an appropriate order of
17 the district court.

18 THE COURT: All right. Mr. Steinberg?

19 MR. STEINBERG: Your Honor, in the context of the
20 order that you've indicated that you will enter, a stay pending
21 appeal makes no sense. And the whole oral argument that you
22 heard here before was really a reargument motion and was not a
23 stay pending appeal motion.

24 Your Honor has indicated that it was inappropriate
25 for them to go to California and to continue to prosecute the

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1 action in California. So if you're going to stay the entry of
2 the order, what does that mean as a practical matter? After
3 having ruled that it was improper to go to California, he now
4 is actually asking you to stay that order so he can go to
5 California? Which is 180 degrees of the relief you just
6 granted? This is not like he has a judgment and he wants to
7 stop us from enforcing the judgment because he wants to take
8 his appellate rights. I'm trying to collect on a monetary
9 judgment. This is started because he shouldn't have gone to
10 California in the first place. He shouldn't have violated the
11 wind-down agreement. He should have done -- he didn't have a
12 judicial right. And now he's asking Your Honor to stay it so
13 he can, in effect, do what he started to do which was the
14 reason why we brought the motion in the first place.

15 But I think he didn't answer your question what are
16 the four prongs for a stay pending appeal. He did talk about
17 the likelihood of success on the merits. And I don't think he
18 said anything today other than try to reargue what Your Honor
19 had just ruled upon as to the likelihood of success on the
20 merits.

21 Frankly, the other three grounds all, I think, favor
22 New General Motors. The harm to the appellant -- well, on the
23 surface, one could say he's harmed because the Chevrolet
24 dealership will be terminated on October 31st. The actual harm
25 is that he didn't have a judicial right and you're not

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1 depriving him of a judicial right. Conversely, the harm to
2 others being the appellee, which is New General Motors and the
3 new dealership, are dramatic if Your Honor's order is not
4 enforced. And Your Honor's opinion addressed the public
5 interest element which is the necessity of protecting buyers in
6 a Section 363 order and the Court's exclusive jurisdiction and
7 the public interest that's involved there.

8 I think the only other thing I would add, and it has
9 nothing to do with the stay pending appeal other than the
10 likelihood of success, I'll just point out that he wants to
11 refer to the complaint that was -- the petition that was filed
12 by Rally in California. On the corruption, fraud and undue
13 means by General Motors, that's just a label that he put on a
14 caption in a petition. He does not allege one thing about
15 fraud corruption in connection with the arbitration process.
16 He's saying that there were public statements made by Fritz
17 Henderson as to, in general, the importance of a dealership
18 network, and he's saying that that was misleading. But it has
19 nothing to do with actually what happened in the arbitration
20 and under the Dealer Arbitration Act. And as far as the
21 misconduct being beyond prec -- established precedent, if you
22 read the paragraph, what he's saying is that the award goes
23 beyond Section 747 because they believe that that statute,
24 which is absolutely silent on the issue, doesn't allow for the
25 assumption of one dealership -- the rejection of one dealership

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1 agreement and the assumption or the reinstatement for the other
2 three. That's the misconduct of going beyond what is
3 established precedent.

4 Your Honor's decision ruled that if you had to
5 address the merits, even though you weren't, you thought that
6 New GM and the arbitrator was right on that issue. So he can
7 point to a petition, which is based on the Federal Arbitration
8 Act, citing standards but have no application to the facts of
9 this case and then everything else on the standards for a stay
10 pending appeal warrant for the denial of the stay.

11 And he purposely didn't answer your question as to a
12 bond because, at this point in time, the bond -- we're not
13 looking for a bond. We're looking for the relief that we
14 brought our motion for. And a stay pending appeal is, in
15 effect, a denial of our motion which Your Honor just granted.

16 (Pause)

17 THE COURT: Stand by, everybody. Sit in place.

18 (Pause)

19 THE COURT: Gentlemen, in this supplemental
20 proceeding, Rally moves by oral motion, with my consent, for a
21 stay pending appeal. And I am granting its motion to the
22 extent of providing for a seven calendar day stay to permit
23 Rally to go to the district court in this district. And the
24 motion is otherwise denied. The following are the bases for my
25 exercise of discretion in this regard.

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1 Though I have no memory of hearing it expressly
2 invoked, a motion of this character is governed by Federal Rule
3 of Bankruptcy Procedure 8005. It provides in relevant part
4 that "A motion for a stay of the judgment order or decree of a
5 bankruptcy judge for relief pending appeal must ordinarily be
6 presented to the bankruptcy judge in the first instance...A
7 motion for such relief" granted by -- "or for modification or
8 termination of relief granted by a bankruptcy judge may be made
9 to the district court but the motion shall show why the relief,
10 modification or termination was not obtained from the
11 bankruptcy judge. The district court...may condition the
12 relief it grants under this rule on the filing of a bond or
13 other appropriate security with the bankruptcy court."

14 As the language I just quoted makes clear, the rule
15 is not terribly helpful with respect to the standards for
16 considering a motion of that character. Rather, for that, we
17 look to the case law which, in the bankruptcy appellate arena,
18 takes a considerable amount of guidance from similar issues
19 presented under the FRAP, the Federal Rules of Appellate
20 Procedure.

21 I exercise my discretion in accordance with my
22 earlier decision, coincidentally in General Motors, at 409 B.R.
23 24, and the affirmants by Judge Kaplan of the district court in
24 2009 U.S. District Court Lexis 61279. As I stated in my ruling
25 there, in GM, the decision as to whether or not to grant the

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1 stay of an order pending appeal lies with the sound discretion
2 of the Court. See, for example, *In re Overmyer*, 53 B.R. at
3 955. Though the factors that must have to be satisfied have
4 been stated in slightly different ways and sometimes in a
5 different order, it's established that to get a stay pending
6 appeal under Rule 8005, a litigant must demonstrate it would
7 suffer irreparable injury if a stay were denied; there is a
8 substantial possibility, although less than a likelihood of
9 success on the merits of a movant's appeal; other parties would
10 suffer no substantial injury if the stay were granted; and that
11 the public interest favors a stay. See, for example,
12 *Hirschfeld v. Board of Elections*, 984 F.2d at page 39. It's a
13 decision of the Second Circuit in 1992; *In re DJK Residential*,
14 2008 U.S. Dist. LEXIS 19801; and 2008 WL 650389, a decision by
15 Judge Lynch back when he was a district judge; and *In re*
16 *Westpoint Stevens*, 2007 U.S. Dist. LEXIS 33725, 2007 WL
17 1346616, a decision by Judge Swain of the district court.

18 The burden on the movant is a "heavy one". See, for
19 example, *DJK* at *2. See also *U.S. v. Private Sanitation*
20 *Industrial Assoc.*, 44 F.3d 1082 at page 1084, another decision
21 of the Second Circuit. To be successful, the party must "show
22 satisfactory evidence of all four criteria". *In re Turner*, 207
23 B.R. at page 375, a decision of the former Second Circuit BAP
24 in 1997. Moreover, if the movant seeks the imposition of a
25 stay without a bond, the applicant has the burden of

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1 demonstrating why the Court should deviate from the ordinary
2 full security requirement. See DJK at *2, Westpoint Stevens at
3 *4.

4 While, as Judge Lynch noted in DJK, the Second
5 Circuit BAP has held that the failure to satisfy any prong of
6 the four-circuit test "will doom the motion," with Jerry Lynch
7 having cited Turner. The Circuit in more recent cases have
8 engaged in a balancing process with respect to the four factors
9 as opposed to adopting a rigid rule. In my earlier ruling in
10 GM, I assumed without deciding that the balancing approach
11 would be more appropriate. And I'm going to do likewise here.
12 I also note that when Judge Kaplan affirmed me in GM in the
13 decision that I described a few minutes ago, I think he took a
14 similar approach.

15 Let me start with injury first. Obviously, I take
16 the loss of a franchise seriously. And indeed, early in the
17 decision that I dictated -- I guess it's now an hour or an hour
18 and a half ago -- I did hopefully express my empathy to dealers
19 losing their franchises. However, what caused the lack of the
20 franchise, or the loss of the franchise, is not the ruling that
21 I issued tonight. It was the dealer termination agreement that
22 was entered into over a year ago. What we have here is
23 Congress recognizing the injury to dealers as a consequence of
24 either rejection of dealership agreements, as was the case in
25 Chrysler, or even the soft landing termination agreements that

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1 we had here, provided dealers with an arbitration remedy to, in
2 essence, undo that which otherwise would happen. And Rally
3 took advantage of that and it won in three-quarters -- or four-
4 fifths -- Pontiac, I guess, ultimately not being relevant -- of
5 the matters which it took before the arbitrator. Now, in
6 essence, what it's asking for is to avoid the injury from a
7 year ago and at the same time to avail itself of the benefits
8 of the arbitration to the extent that it won. With it having
9 won with respect to Buick, Cadillac and GMC, I don't think
10 there is irreparable injury to it by reason of its not having
11 shot the moon in its litigation efforts before the arbitrator.

12 Frankly, folks, I tried very hard to get it right.
13 And we're going to get to a likelihood of success in a minute.
14 But I do not believe that my ruling today causes irreparable
15 injury. And I think really all we're talking about is the
16 results of an arbitration system that was made available for
17 Rally and for which it only succeeded in part.

18 I will, however, assume that there is a -- at least a
19 peppercorn of irreparable injury. I'm certainly not going to
20 disqualify Rally for not showing more in the way of irreparable
21 injury. And I'm not, as I indicated, going to require it to
22 make a strong showing on all fours. I am going to take a
23 balancing approach so I'm going to turn to that next.

24 So let's talk then about likelihood of success which
25 is where Rally spent the bulk of its argument. Although we

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1 talk about likelihood of success, that's a shorthand for a more
2 nuanced analysis. The technical standard is there is a
3 substantial possibility although less than a likelihood of
4 success on the merits. Well, let's slice and dice the various
5 aspects of my earlier ruling.

6 First, the propriety of my conclusion that I do have
7 subject matter jurisdiction and that I have core
8 jurisdiction -- core, of course, not being the subject matter
9 jurisdiction issue but talking about the power of a bankruptcy
10 judge in contrast to a district judge to decide. Those two
11 rulings now seem to be accepted or at least unchallenged. And
12 although there was no express discussion of my decision not to
13 abstain, I didn't hear any argument on that. And, frankly,
14 discretionary abstention is called discretionary for a reason.
15 There would have to be an abusive discretion in my electing not
16 to abstain. And I think that there would not be a material
17 likelihood of success on that and would be far short of a
18 substantial possibility.

19 On the merits, it's undisputed that we're not talking
20 about the Federal Arbitration Act, that the Dealer Arbitration
21 Act provides no right to appeal. And my ruling did not go so
22 far as to say that under no circumstances under anything that
23 might ever be alleged would I deny the right to appeal. What I
24 have said is that to the extent, if any, to which there would
25 be such a right, a construction to, in essence, save the

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1 constitutionality of the statute if it were otherwise put in
2 question, there would have to be something seriously wrong with
3 the arbitration in the way of fraud, corruption, bribery being
4 a species of corruption, or, and I articulated it differently,
5 disregard of applicable authority. I went on to provide two
6 additional levels -- you can call it dictum; you can call it
7 alternative grounds, whatever, which caused me to believe that
8 it's not likely that there's going to be a reversal.

9 And as far as whether there's a substantial
10 possibility, on the facts that were put before me, I don't
11 think there's even that. To be sure, words were put before the
12 district judge triggering responses that if this were an action
13 under the Federal Arbitration Act would get a judge's
14 attention. But as the recent decisions by the Supreme Court in
15 Bell Atlantic v. Twombly and, especially, Ashcroft v. Iqbal
16 tell us, just invoking words making conclusory allegations in a
17 pleading isn't enough. You can't talk about corruption without
18 giving the Court some facts as to lead the Court to believe
19 there was corruption. And we're not talking about corruption
20 by GM. We're talking about corruption by the arbitrator. I
21 used the example before of taking bribes. There are no
22 allegations of ex parte communication. There are no
23 allegations of any irregularities in the proceedings before the
24 arbitrator other than the assertion that, as a matter of law,
25 the arbitrator got it wrong. And even then, there's no

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1 allegation that the arbitrator disregarded any particular case
2 that would suggest to the arbitrator that he got it wrong. So
3 while I think there would be a substantial possibility of
4 success on appeal if I were somehow to rule that there is no
5 right to appeal and that I got to close my eyes to
6 irregularities of the type that I just described if they were
7 shown, it doesn't affect the outcome here because I don't have
8 any facts suggesting any of those things. Bottom line, folks,
9 I do not find a substantial possibility.

10 Third factor. Other parties would suffer no
11 substantial injury if the stay were granted. And here, I think
12 there are potential injuries, at least if we go past October
13 31st, of one type, for sure, and another which more properly
14 may be regarded as being a public interest concern rather than
15 a private prejudice. For GM's benefit, I'll say that I see no
16 prejudice in staying for five days to allow the district court
17 to second guess me on the stay application. And for that
18 reason, I am going to grant a stay to the extent of five days.

19 But we have a new dealer who's taking over on the
20 31st of October. I don't have evidence on it, but I got to
21 assume that the existing franchisee's gain is going to be the
22 new one's loss. They're either going to be competing with each
23 other or that other guy is going to be made to wait if this
24 thing can't proceed past October -- if this somehow proceeds
25 past October 31st. And we have a nationwide program which was

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1 judicially blessed back in July of last year for these dealer
2 unwinds and I think it's prejudicial to New GM to put this
3 system in play to any greater extent than Congress did by its
4 statutory enactment. And Congress didn't say everything you're
5 doing is undone. What it did was say well, we're going to set
6 up this arbitration mechanism. And that's exactly what we got.
7 And it goes without saying that I comply with the congressional
8 but I don't think we should be going beyond what Congress said.

9 Lastly, the public interest favors a stay. That's
10 the final factor. While I quoted the language before, and I
11 think Rally acknowledged its importance, that we deliver to the
12 purchasers of assets in bankruptcy sales that which we have
13 promised. And if and to the extent that the counterparty to a
14 deal with an estate comes back and says I need you to enforce
15 it so I get the benefit of what I had bargained for, we do
16 that.

17 I talked back at the time of the original 363
18 determination and my separate ruling on the stay application
19 that followed my 363 ruling by a couple of days about how
20 important GM's survival is to the public interest and the
21 interest not just of the federal taxpayers but the needs and
22 concerns of the states of Michigan and Ohio and the communities
23 in which GM plants operate. We made decisions then about that
24 which was necessary to give New GM the maximum opportunity to
25 thrive. We made rulings then which are res judicata. I don't

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1 think the public interest is served by interfering with what we
2 then put in place in any way.

3 Certainly, there is no public interest in allowing
4 this collateral attack. It's a private interest to the extent
5 it's any interest. And when a party that was offered and
6 availed itself the opportunity to arbitrate then wishes to take
7 the portion for which it did not win and put the earlier system
8 in play beyond getting the arbitration opportunity for which
9 Congress provided, that is, at the least, not in the public
10 interest and may fairly be regarded as being contrary to the
11 public interest. At best, looking at it most favorably to
12 Rally, it is a wash because it is private interests that are
13 being sought to be advanced and not public ones.

14 So, as my discussion indicates, folks, I think we got
15 to go by the book and deal with it as I did in my decision
16 dictated just a moment ago by the four enumerated factors
17 articulated in the case law for the grant of a stay. And it is
18 stayed to permit a second opportunity to go to the district
19 court for those seven calendar days. And so as not to put a
20 gun to the head of the district court having to issue a
21 decision, like Judge Kaplan did where he had to work all night
22 on it, I don't want to do that to the district court again if I
23 can avoid it.

24 But beyond that, it is denied. Rally is authorized
25 and requested, not ordered, but requested to advise the

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1 district court that an application was made to the bankruptcy
2 court, that the bankruptcy court denied it except to the extent
3 of the five days for the reasons that it dictated into the
4 record and that any further application to the bankruptcy court
5 is dispensed with and waived. From now on, we're in the
6 district court, folks.

7 Yes, sir?

8 MR. STEINBERG: Your Honor, I just have some brief
9 moments and I thank you for staying so late for today. In your
10 presentation in connection with the stay pending appeal, you
11 said seven calendar days but I believe you also said at one
12 point in time five days. So --

13 THE COURT: If I did, it was a reference to five
14 business days. Seven calendar days transposes into five --

15 MR. STEINBERG: Okay.

16 THE COURT: -- business days. And ever since we
17 amended the federal rules of many different types last
18 December, we now go on bunches of seven calendar days.

19 MR. STEINBERG: The second thing, Your Honor, is that
20 while I'm not exactly sure what I would have otherwise done
21 during the seven calendar day period because the wind-down
22 agreement is fairly passive, I do want to make sure that I'm
23 still able to present to Your Honor the order that you had
24 asked for --

25 THE COURT: Of course you can.

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1 MR. STEINBERG: Okay. And I think that's it. I
2 understand that the only activity that will happen from this
3 point on is in the district court of this district.

4 THE COURT: Correct. All right. It's been a long
5 day. Good evening, gentlemen. We're adjourned.

6 (Whereupon these proceedings were concluded at 7:23 p.m.)
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I N D E X

R U L I N G S

DESCRIPTION

PAGE LINE

Motion of New GM for an order enjoining Rally

41 8

Dealership from interfering with New GM's

ability to reform its dealership platform,

from vacating or modifying an arbitration

decision and from pursuing that effort in

California district court granted

Court declines to exercise its discretionary

50 12

abstention

Oral motion by Rally Auto for a stay pending

71 21

appeal granted for five business days to permit

Rally to go to district court;

but denied in all other respects

71 24

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET**D-486)

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Date: October 6, 2010

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